United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

ORIGINAL

75-4179

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL DYNAMICS CORPORATION, a corporation, and ELLIOTT MEYER, individually and as an officer of said corporation,

Petitioners,

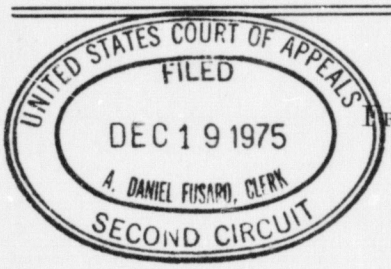
—against—

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF FOR PETITIONERS



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Statement of the Case

This is a petition to review, modify and set aside paragraphs I and II of a reformulated cease and desist order of the Federal Trade Commission (the "Commission," or "Respondent") dated June 17, 1975, served on or about June 26, 1975.

The basis of this application for review is 15 U.S.C. 45(c). Petition for Review was filed August 26, 1975.

The Order was reformulated pursuant to an opinion of this Court, dated March 6, 1974 (appearing at 492 F.2d

1332 (1974)) and reprinted for the convenience of the Court in the accompanying Appendix at p. 114a, which had rejected the first two paragraphs of an order of the Commission, dated February 16, 1973 (83a).

Following remand, the Commission reopened the proceeding by order, dated October 8, 1974 (117a). Counsel supporting the complaint submitted its proposed reformulation on November 18, 1974 (118a). National Dynamics submitted its proposed reformulation on November 19, 1974 (130a). Counsel supporting the complaint replied to the reformulation proposed by National Dynamics on December 4, 1974 (133a) and National Dynamics replied to Complaint counsel's proposal on December 9, 1974 (138a).

On March 4, 1975, the Commission entered a final order on remand (142a).

On April 12, 1974, counsel supporting the complaint moved for reconsideration (152a), of the Commission's "final order" and on May 14, 1975, National Dynamics filed its opposition to the motion (169a).

On May 27, 1975, the Commission stayed the effective date of its order of March 4, 1975 (172a), and on June 17, 1975, it issued the Order which petitioner herein seeks reviewed (173a).

Petitioner, National Dynamics Corporation is a corporation organized and existing under the laws of the State of Florida, with its office and principal place of business at 145 East 32nd Street in the City, County and State of New York. The Corporation markets, exclusively through mail order, a battery additive called VX-6. It was stipulated between counsel that in 1969, respondents sold VX-6 to

12,000 individuals who bought for resale, and 6,000 individuals who purchased as consumers (Transcript (T.R.) 173).

Petitioner Elliott Meyer is an individual and an officer, and director of the corporate petitioner, and he formulates, directs and controls the acts and practices thereof. (Throughout most of this brief, the petitioners will be referred to collectively as "petitioners.")

On November 21, 1969, the Commission issued a Complaint and Order (1a-12a) alleging that petitioners were engaged in unfair methods of competition and deceptive acts and practices in violation of Section 5 of the Act (15 U.S.C. 45(a)(1)).

So far as material to this petition, the Complaint alleged that petitioners through the publication of the advertising representations set forth at pages 2, 3, and 4 of the Complaint, (2a-4a) falsely represented to the public, among other things, that petitioners' agents and distributors were regularly earning $1,554 per week, $25,000 per year and other high amounts, whereas in truth and in fact, distributors do not realize such earnings and, on the contrary, few if any attain such earnings.

Three pre-trial hearings were held in Washington, D.C. and evidentiary hearings were held in New York City. Seventeen witnesses testified, almost 400 documents were admitted into evidence, including approximately 7 laboratory tests of VX-6, and over 4800 pages of testimony taken. The Administrative Judge, the Honorable Donald R. Moore, made findings of facts and conclusions of law and entered an order, dated May 24, 1971, dismissing most of the Complaint.

The opinion, findings, conclusions and Order of the Administrative Judge are at Appendix pages 14a-82a. Briefly, as relates to the instant petition, the Judge's Order prohibited past earnings claims of specific distributors of VX-6 unless such claims represented earnings of a substantial number of agents.

The Commission's Order of February 16, 1974 followed (83a), and Petitioner's appeal from that order resulted in this Court's opinion remanding for reformulation of paragraphs 1 and 2 (114a).

The Commission's Order

Paragraph I of the Commission's reformulated Order is overbroad and violates this Court's guidelines on remand as well as Petitioner's First Amendment rights under the Constitution.

Paragraph II of the Order violates this Court's guidelines on remand, rendering both Paragraph I and II defective and they both should be set aside.

Questions Presented

1. Do paragraphs 1 and 2 of the Commission's reformulated Order comply with the opinion of this Court, dated March 6, 1974?

Petitioner argues "no."

2. Does Paragraph I of the Commission's reformulated Order violate petitioner's right under the First Amendment to the United States Constitution?

Petitioner argues "Yes."

POINT I

The prohibition against the representation of potential earnings of distributors violates the opinion of the Court of Appeals remanding this case to the Commission and is inconsistent with prior provisions accepted by the Commission.

Paragraph (I) (A) prohibits respondents from:

> (I) (A) Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits, or earnings therefrom;

The word "can" in the first sentence of the Order effectively prohibits the representation of potential earnings of distributors. Such prohibition was not in the Proposed Order filed with the complaint in 1965, (10a) was not in the Examiner's Order of May 1971, (80a) but appeared for the first time in the Commission's Order of February 16, 1973. (84a). As a practical matter, if petitioners cannot represent that prospective distributors "can" earn profits selling its product, then the balance of the Order is meaningless, because petitioner will never be able to sell to a prospective distributor. Such a prohibition is illogical. If petitioner is allowed to represent past earnings within the confines of subparagraphs (1), (2), (3) and (4), why cannot representations of potential earnings be based, at least, upon those representations?

The prohibition of potential earnings claims is clearly beyond the authority of the Commission and the opinion on remand from this Court. In that opinion, dated March 6, 1974, this Court stated that the affidavit of compliance on

a "similar issue" approved by the Commission in *In the Matter of Merlite Industries, Inc.*, File No. 6523049, dated March 1, 1967, "may afford a useful basis from which to start a redraft" of the National Dynamics Order.

The applicable *Merlite* provision to which this Court referred reads as follows:

> "All advertisements and other promotional material pertaining to *potential earnings* which can be made by independent sales agents purchasing Durasan or other merchandise sold by Merlite, or by any other companies whose policies deponent is responsible for, *will have a reasonable basis in fact.* General statements to the effect that sales agents can earn $8, $15 or $25 an hour selling such merchandise will not be used where such profits would represent only unusual earnings by a small percentage of sales agents *unless the pertinent facts with reference to such earnings are disclosed.* Also, deponent will avoid the use of such statements as 'hundreds are cleaning up small fortunes' in reference to potential earnings of sales agents selling his merchandise *without also disclosing all of the pertinent facts with reference to such earnings. Nothing in this assurance shall prohibit Merlite or deponent from utilizing accurate testimonials from sales agents*" (emphasis added).

Thus, it is evident from the face of the provision that representations of "potential" earnings of distributors were to be permitted by the Commission, so long as they "have a reasonable basis in fact", and so long as "general statements to the effect that sales agents *can earn* $8, $15 or $25, an hour will not be used where such profit would rep-

resent only unusual earnings by a small percentage of sales agents *unless the pertinent facts with reference to such earnings are disclosed*" (emphasis added).

Petitioners herein ask for nothing more than to be allowed to advertise under the terms of the *Merlite* affidavit which this Court previously explicitly approved.

In addition to *Merlite*, the Commission accepted a Consent Order in a similar case to the one at bar, in *In the Matter of Federated Sanitary Corp., et al.*, File No. 7023176, signed August 2, 1974, in which representations of distributors' potential earnings were not prohibited. The relevant provision reads as follows:

> "IT IS ORDERED that respondents Federated Sanitary Corp., a corporation, its successors and assigns, and its officers, and Harry Wessel, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of toilet bowl cleaners, air freshers, or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:
>
> 1. Representing, directly or by implication, that individuals will earn any stated gross or net amount, or representing, in any manner, the past earnings of individuals where such profits represent unusual earnings by a small percentage of individuals unless the pertinent facts with reference to such earnings are disclosed: for example, full or part-time employment or whether the individual operates alone or employs a staff."

Thus, in *Federated Sanitary,* not only is the word "can" omitted, but respondents there can represent what distributors "will" earn, so long as the qualifying language is also used.

The Order promulgated by the Commission in the case at bar, therefore, is arbitrary and capricious in that it unreasonably restricts petitioners from advertising that distributors "can" earn amounts which have a reasonable basis in fact, and prohibits that which is allowed in both *Merlite* and *Federated Sanitary.*

Furthermore, the prohibition violates this Court's directive to the Commission in the Opinion on remand and violates petitioners' First Amendment right as an "unreasonable "prior restraint" (see Point II, *infra*).

POINT II

The prohibition against representing past or present sales, profits or earnings of distributors, despite the exceptions allowed by the Commission, violates the prior opinion of the Court of Appeals and petitioners' first amendment rights.

Paragraph (I) (B), in part, prohibits respondents from:

> "(B) Misrepresenting in any manner the past, present or future sales, profits or earnings from the resale of respondents' products, or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products, except . . ."

Paragraph (I)(B) prohibits respondents from "representing directly or by implication, the past or present sales,"

profits or earnings of purchasers of respondents products," with certain specified exceptions. This clause is too restrictive and beyond the mandate of this Court.

Nowhere in the opinions of the Commission does any justification appear for such a blanket prohibition against truthful non-deceptive representations of fact. No past violation of the act can justify the prohibition of future representations that are truthful and not deceptive. Furthermore, such an order is a "prior restraint" and a violation of petitioners' First Amendment rights.

This point again brings into focus the perennial conflict between government and advertiser in resolving the permissible limits under the First Amendment of a rule or regulation prohibiting commercial advertising.

The competing factors were recently resolved in favor of an advertiser, by the Supreme Court in *Bigelow* v. *Virginia,* —— U.S. —— (1975), 95 S.Ct. 2222, 44 L.Ed. 2d 600. In that case, the Supreme Court of Virginia had affirmed Bigelow's conviction for violating a State prohibition against the publication of any advertisement for an abortion referral service. The State Court had made two assumptions, namely, that "the First Amendment guarantees of speech and press are inapplicable to paid commercial advertisement . . . ," and, the State has a legitimate interest in using its police power to prohibit advertising affecting the health of its citizens.

The Court noted at the outset that speech is not stripped of First Amendment protection "merely because" it appears in the form of a paid commercial advertisement, citing, *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 384, 37 L.Ed. 2d 669, 93

S.Ct. 2553 (1973); and *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 266, 11 L.Ed. 2d 686, 84 S.Ct. 710, 95 A.L.R. 2d 1412 (1964) (44 L.Ed. 2d at 609).

The Court then contrasted Bigelow's ad with categories of speech which have been held to be clearly unprotected, such as "fighting words, . . . obscenity, . . . or incitement. . . ."

The Court distinguished *Valentine* v. *Chrestensen*, 316 U.S. 52, 86 L.Ed. 1262, 62 S.Ct. 920 (1942), where the prohibition against the distribution on a wharf, of a handbill, advertising the tour of a submarine for a fee, was upheld, as a reasonable regulation of the manner in which commercial advertising could be distributed.

The Court stated that in analyzing a particular prohibition against advertising one starts with the proposition that paid commercial advertising is not stripped of all First Amendment protection. "The relationship of speech to the marketplace of products, or of services does not make (advertising) valueless in the marketplace of ideas" (44 L.Ed. 614).

The Court distinguished cases where advertising was deceptive or fraudulent. Here, petitioners do not contend they are entitled to First Amendment protection of false or deceptive advertising, but they are entitled to protection from restraints upon advertising which it has yet to publish. Regardless of petitioners' past conduct, the Commission has no right to punish petitioners by restraining them from publishing truthful non-deceptive advertising in the future. The severe restraints and restrictions imposed here are beyond any legitimate public interest, not-

withstanding the Commission's inevitable citation of the shopworn doctrine of "fencing-in" of past violators. (*Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431 (1957); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965)). The Commission cannot, consistent with petitioners' rights under the First Amendment, prohibit truthful representations, even if an "escape clause" has been provided. *Federated Nationwide Wholesalers Service* v. *FTC*, 398 F.2d 253 (1968).

In *Federated*, this Court struck down an FTC order which blanketly prohibited representations of the "wholesaler" status of the "wholesaler" petitioner, except, as a defense, the petitioner was allowed to prove the truth of the representation.

In the instant case, the prohibition is even more of a "blanket," in that it does not even offer petitioner the qualifying "escape clause," of "truth," as in *Federated*. What it does offer instead, is a series of "exceptions," which does not cure the First Amendment violation, but does severely limit what petitioners are allowed to advertise. In petitioners' opinion, the clause is overly restrictive and burdensome, in that it does not, in general, permit truthful, non-deceptive representations, and violates this Court's opinion of March 6, 1974, as well as petitioners' rights under the First Amendment, as interpreted by the Supreme Court in *Bigelow* (*supra*).

POINT III

The "exceptions" of subparagraphs (1), (2), (3) and (4) are unduly restrictive of the range of permissible advertising and violates the prior opinion of the Court of Appeals.

Paragraph (I) (B) further provides:

> ". . . any or all of the following representations shall not be prohibited:
>
> (1) A true statement of the average or median sales, profits, or earnings actually achieved by all purchasers of respondents' products during any stated time period.
>
> (2) A true statement or testimonial of any particular amount of sales, profits, or earnings actually achieved or exceeded by *a substantial* number of purchasers of respondents' products during any stated time period, provided that it is accompanied by a clear and conspicuous disclosure (if printed, in typesize at least equal to that of the statement of sales, profits, or earnings) of the percentage of the total number of purchasers who have achieved such results.
>
> (3) An accurate representation of any range or ranges of sales, profits, or earnings actually achieved by purchasers of respondents' products for any stated period of time. Ranges describing yearly results shall not exceed $4,000 (*e.g.*, $0-4,000; $2,000-6,000; $4,000-8,000). Ranges describing monthly results shall not exceed $350 (*e.g.*, $0-350; $350-700) and ranges describing results for any other time period shall not exceed an amount constituting the same percentage of

$4,000 as the time period constitutes of one year. A representation of any range or ranges of sales, profits, or earnings achieved by purchasers of respondents' products must include a clear and conspicuous statement (if printed, in typesize at least equal to that of the statement of the range) of the percentage which purchasers achieving results within the range constitute of the entire number of respondents' purchasers, provided, however, that if the ranges employed begin with $0 and proceed continuously upward, a statement of the number of purchasers within each range may be included in lieu of the percentage.

(4) Truthful testimonials regarding the sales, profits, or earnings achieved by a purchaser of respondents' products, provided that any such testimonial includes or is accompanied by the following clear and conspicuous disclosures (if printed, in boldface type at least equal in size to that of any sales, profits, or earnings figure stated in the testimonial):

(i) An accurate statement of the average amount of time per day, week, or month required by the purchaser to achieve the stated results;

(ii) An accurate statement of the year or years during which, and the geographical area(s) in which, the stated results were achieved;

(iii) If the results achieved by the purchaser providing the testimonial have not been achieved by at least 10% of all purchasers of respondents' products during the time period covered by the testimonial, a statement of the average or median sales (or profits or earnings, whichever is included in the testimonial)

of all purchasers of respondents' products during the time period covered by the testimonial, or the following statement:

> IMPORTANT NOTICE: THE RESULTS DESCRIBED ABOVE ARE SUBSTANTIALLY IN EXCESS OF THE AVERAGE RESULTS ACHIEVED BY ALL OUR DISTRIBUTORS. OUR RECORDS SHOW THAT ONLY .....% OF OUR DISTRIBUTORS HAVE EQUALLED OR EXCEEDED THE PERFORMANCE DESCRIBED ABOVE DURING THE INDICATED TIME PERIOD; and

(iv) If the results achieved by the purchaser providing the testimonial have been achieved by 10% or more of all purchasers of respondents' products during the time period covered by the testimonial, but are in excess of the average or median results achieved by all purchasers, a statement of the percentage of all respondents' distributors who, according to respondents' records, have achieved equal or better results during the same time period, or a statement of the average or median results achieved by all purchasers of respondents' products during the same time period."

The list of "truthful exceptions to the blanket prohibition of the second clause of Paragraph I, proposed by the Commission, is not exhaustive. For example, while allowing "truthful testimonials," under certain conditions, it would not allow a non-testimonial description of the earnings of any particular individual. Thus, as may often occur, if petitioner knows of the earnings of an individual distributor, who refuses to authorize the use of his name,

petitioner will not be able to advertise the information in a non-deceptive manner. Such a result would violate petitioner's First Amendment rights (see Point II, *supra*).

Each of the subparagraphs specifically requires the allowed representation to be "truthful," except subparagraph (3) which requires that the representation be "accurate." Thus, in an enforcement proceeding, petitioners would be in violation of the Order if it published an *accurate* statement of the average or median sales . . . ," or an *accurate* "statement of any particular amount . . . ," which was not "truthful." The difference is significant.

This legislation of "truth" by the Commission, although the effort is commendable, appears to be particularly insidious with respect to subparagraphs (1) and (2), where the representation itself would depend upon the interpretation of statistical computations. The "truth" of an interpretation of statistics usually varies depending upon the person performing or interpreting the computation. Petitioner can envision nightmarish litigation with the Commission as to the "truth" of its statistics, with the outcome dependent upon petitioners' ability to prove to a Court the "truth" of its statistics and the underlying assumptions. Such a risk cannot be minimized by reference to the Commission's procedure for advisory opinions and guidance (16 C.F.R. 3.61(d), 3.71(d)). The Commission would have little choice but to interpret the order literally and petitioners' problem could not be avoided. If petitioners made any assumption which the Commission's Compliance staff failed to agree with, such as the number of petitioners' customers who purchased for resale during any particular period (in contrast to consumers), it would risk violating the order.

In general, requiring petitioner to statistically justify the truth of its advertising with "true" "averages", "medians" and "ranges" will effectively prohibit petitioner from advertising. In addition, as this Court noted in its opinion on remand, petitioners have stated that they have no way of knowing the sales results of all its distributors and could not make the calculations required to satisfy Paragraph I.

POINT IV

Paragraph II of the Order fails to include a provision specifically required by the Court of Appeals and is, therefore, invalid. Furthermore, by reason of such omission, the Commission has also invalidated paragraph I of its Order.

Paragraph (II) of the Order prohibits petitioners from:

> "(II) Failing to maintain records which substantiate that any representation made regarding past or present sales, profits, or earnings are accurate. Such records shall be sufficient to substantiate the accuracy of any representations made regarding amounts earned or sold, the number or percentage of purchasers achieving such results, the time period during which such results are achieved, and the amount of time per day, week, or month required to achieve such results."

Paragraph II of the Order patently fails to include that portion of this Court's clear and unambiguous direction to the Commission, that to substantiate petitioners' earnings claims,

> "records showing the sales to each distributor and information concerning the permitted mark-up . . . would suffice if the representations were similarly limited. We think this paragraph should be clarified as indicated."

Despite this clear direction to the Commission by the Court, and petitioners' inclusion of such a provision in its proposed order to the Commission, the Commission has apparently completely ignored this aspect of the Court's direction.

The defect not only effects Paragraph II, but contributes to the invalidity of Paragraph I. The specific representations allowed by the Commission in Paragraph I appear to leave little room for the type of representation allowed by the Court in the language quoted above, because each representation allowed in Paragraph I must have been "actually achieved" by the distributors.

Therefore, both paragraphs I and II are invalid by failing to provide for the type of representation and substantiation specifically called for by this Court in its opinion of March 6, 1974.

Conclusion

For the foregoing reasons, the Commission's Order should be set aside.

Dated: December 17, 1975

Respectfully submitted,

FRIEND & DORFMAN, P.C.
Attorneys for Petitioners

JEROLD W. DORFMAN
Of Counsel

376—Affidavit of Service by Mail

The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

State of New York, County of New York, ss.:

SAMUEL D. GROSBY being duly sworn deposes and says that he is agent for FRIEND & DORFMAN the attorney for the above named Petitioner herein. That he is over 21 years of age, is not a party to the action and resides at 6 WAKEFIELD Road WILTON, CONN.

That on the 19th day of DECEMBER, 1975, he served the within Petitioner's BRIEF

upon the attorneys for the parties and at the addresses as specified below

(2 Copies) JOHN T. FISCHBACH, ESQ. Office of General Counsel FEDERAL TRADE COMMISSION, WASHINGTON, D.C. 20580;

(1 Copy) Robert BORK, Esq. Solicitor General, UNITED STATES, DEPARTMENT OF JUSTICE, WASHINGTON, DC. 20530;

(1 Copy) CHARLES A. TOBIN, ESQ. SECRETARY, FEDERAL TRADE COMMISSION WASHINGTON, D.C. 20580

by depositing Said Copies to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York directed to the said attorneys for the parties as listed above at the addresses aforementioned, that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 19th day of December, 1975

Roland W. Johnson

ROLAND W. JOHNSON,
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Samuel D. Grosby